Lau Jick Ing v Lim Heng Sean @ Eddie Lim & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-632–11 OF 2019
KHADIJAH IDRIS J
30 AUGUST 2020

Civil Procedure — Injunction — Interim injunction to restrain party from presenting winding up petition — One of two shareholder-directors of company applied for leave to commence derivative action on company's behalf against fellow miscreant shareholder-director — Miscreant shareholder-director had acted to company's detriment by holding up monies due to it from another company ('SM') which he controlled — On coming to know of application for derivative action miscreant shareholder-director gave co-director notice of his intention to wind up company on ground it was 'just and equitable' to do so as their relationship of mutual trust and confidence in managing the company had irretrievably broken down — Co-director applied for fortuna injunction to prevent winding up petition from being presented — Whether threatened winding up petition was an abuse of process of court which had no chance of success but would instead cause irreparable harm to company as a going concern — Whether threatened winding up was not bona fide but for ulterior purpose of preventing company from recovering its dues from SM

The plaintiff and the first defendant ('D1') were equal shareholders and directors of the second defendant ('D2'). D1 was also a shareholder and director of another company ('Sutera Matra') which he controlled and which had business dealings with D2. On the ground that D1 had acted to D2's detriment by holding up substantial amounts in commissions payable by Sutera Matra to D2, the plaintiff filed the instant originating summons ('OS') for leave to commence a derivative action in D2's name against D1 to recover the monies due to D2. In an affidavit supporting the OS, the plaintiff set out various instances where D1 had acted in breach of his fiduciary duties to D2 by acting against its interests. Shortly after he came to know of the filing of the instant OS, D1 notified the plaintiff of his intention to wind up D2 on the ground that it was 'just and equitable' to do so. D1 contended that the winding up was necessary since the mutual trust and confidence between him and the plaintiff had completely and irretrievably broken down such that it was no longer possible for them to work together to manage D2. In response to D1's notice, the plaintiff filed the instant application for an interim injunction to restrain D1 from presenting any winding up petition against D2 pending the final disposal of the OS. The plaintiff contended that D1's threat to wind up D2 was an afterthought made in bad faith for the collateral purpose of preventing D2 from recovering its monetary dues from Sutera Matra. The

plaintiff argued that the threatened winding up petition not only had no chance of success but would irreparably damage D2 as a going concern. D1, on the other hand, argued that he should not be deprived of his statutory right to present a winding up petition on just and equitable grounds and that it should be left to the winding up court to decide what was just and proper in the circumstances.

Held, allowing the application for the interim injunction:

(1) The plaintiff's application for a fortuna injunction was allowed as D1's proposed petition to wind up D2 not only had no prospect of success but would irreparably damage D2 as a going concern (see para 52).

(2) The facts clearly showed that D2 was at all material times a going concern making good pre-tax net profits and therefore it was not to D1's interest as a shareholder and director of D2 to wind up the company. D1's threat to wind up D2 — made only after the plaintiff had filed the instant OS for a derivative action — was an abuse of process of court as it was to achieve the collateral purpose of denying D2 of the commissions due to it from Sutera Matra in which D1 had a proprietary and pecuniary interest. Clearly, D1's interest to wind up D2 was not bona fide but an afterthought (see paras 35, 38, 40 & 50–51).

(3) D1 did not come to court with clean hands, yet he sought to invoke the equitable jurisdiction of the court to wind up D2 on 'just and equitable' grounds. Besides holding 50% of the shares in D2 he was also a director and shareholder of Sutera Matra which held up the payment of commissions that were payable to D2. D1 was clearly in a position of conflict of interest and was acting to D2's detriment. It was untenable for D1 to argue that D2 would not be prejudiced if it was wound up as D2's liquidator could pursue the claim against Sutera Matra (see paras 33–34, 36 & 39).

(4) The court did not find any legitimate grounds for D1 to assert that the relationship between himself and the plaintiff had so completely and irretrievably broken down that they could no longer work together to manage D2 and that it was just and equitable that D2 should be wound up. Their relationship might have soured or they might be at loggerheads but to say that it was completely impossible to mend their relationship for the sake of D2 was premature (see para 42).

[Bahasa Malaysia summary

Plaintif dan defendan pertama ('D1') adalah pemegang saham sama rata dan pengarah bagi defendan kedua ('D2'). D1 juga merupakan pemegang saham dan pengarah syarikat lain ('Sutera Matra') yang beliau dikendalikan dan mempunyai urusan perniagaan dengan D2. Dengan alasan bahawa D1 telah bertindak dengan menyebabkan kerugian D2 dengan menahan sejumlah besar

komisen yang harus dibayar oleh Sutera Matra kepada D2, plaintif memfaikan saman pemula semasa ('OS') bagi kebenaran untuk memulakan tindakan terbitan atas nama D2 terhadap D1 untuk mendapatkan kembali wang terhadap D2. Melalui afidavit yang menyokong OS, plaintif menyatakan pelbagai keadaan di mana D1 telah bertindak melanggar tugas fidusiarinya kepada D2 dengan bertindak bertentangan dengan kepentingannya. Tidak lama setelah beliau mengetahui mengenai pemfailan OS semasa, D1 memaklumkan kepada plaintif niatnya untuk menggulung D2 dengan alasan bahawa ianya 'adil dan saksama' untuk berbuat demikian. D1 berpendapat bahawa penggulungan tersebut adalah perlu kerana saling percaya dan keyakinan antara beliau dan plaintif telah berakhir sepenuhnya dan tidak dapat dipulihkan lagi sehingga ianya adalah mustahil bagi mereka untuk bekerjasama bagi menguruskan D2. Sebagai balasan kepada makluman D1, plaintif memfailkan permohonan semasa untuk suatu injunksi interim bagi menahan D1 daripada mengemukakan sebarang petisyen penggulungan terhadap D2 sementara menunggu pelupusan muktamad OS. Plaintif berpendapat bahawa ancaman dari D1 untuk menggulung D2 adalah suatu pemikiran semula yang dibuat dengan niat jahat sebagai ugutan untuk menghalang D2 bagi mendapatkan wang kembali dari Sutera Matra. Plaintif berpendapat bahawa ancaman untuk petisyen penggulungan bukan hanya tidak memiliki peluang untuk berjaya tetapi juga akan menyebabkan D2 mengalami masalah yang berterusan. D1, sebaliknya, berpendapat bahawa beliau tidak boleh dilucutkan hak berdasarkan undang-undangnya untuk mengemukakan petisyen penggulungan dengan alasan ianya adalah adil dan saksama dan bahawa ia harus diserahkan kepada mahkamah penggulungan untuk memutuskan apa yang adil dan tepat dalam keadaan tersebut.

Diputuskan, membenarkan permohonan injunksi interim:

(1) Permohonan plaintif untuk injunksi fortuna dibenarkan kerana petisyen yang dikemukakan oleh D1 untuk menggulungkan D2 bukan sahaja tidak memiliki prospek untuk berjaya tetapi juga akan menyebabkan D2 mengalami masalah yang berterusan (lihat perenggan 52).

(2) Fakta telah dengan jelas menunjukkan bahawa D2 pada masa yang material mengalami masalah berterusan membuat keuntungan bersih sebelum cukai dan oleh itu, bukan pada kepentingan D1 sebagai pemegang saham dan pengarah D2 untuk menggulungkan syarikat tersebut. Ancaman D1 untuk menggulungkan D2 — dibuat hanya setelah plaintif memfailkan OS semasa untuk tindakan terbitan — adalah suatu penyalahgunaan proses mahkamah kerana untuk mengugut bagi menghalang D2 menerima komisen daripada Sutera Matra di yang D1 mempunyai kepentingan keempunyaan dan kewangan. Ianya adalah jelas, kepentingan D1 untuk menggulungkan D2 bukanlah berdasarkan suci hati tetapi suatu pemikiran semula (lihat perenggan 35, 38, 40 & 50–51).

(3) D1 tidak datang ke mahkamah dengan suci hati, namun beliau memohon untuk menggunapakai bidang kuasa ekuiti mahkamah untuk menggulung D2 dengan alasan 'adil dan saksama'. Selain memegang 50% saham di D2, beliau juga merupakan pengarah dan pemegang saham Sutera Matra yang menahan pembayaran komisen yang harus dibayar kepada D2. D1 dengan jelas berada dalam posisi konflik kepentingan dan bertindak dengan menyebakan kerugian D2. Ianya tidak dapat dipertahakan oleh D1 untuk berpendapat bahawa D2 tidak akan diprejudiskan sekiranya digulung kerana pelikuidasi D2 dapat menuntut tuntutan terhadap Sutera Matra (lihat perenggan 33–34, 36 & 39).

(4) Mahkamah tidak menemukan alasan yang sah untuk D1 menegaskan bahawa hubungan antara beliau dan plaintif telah berakhir sepenuhnya dan tidak dapat dipulihkan lagi sehingga mereka tidak lagi dapat bekerjasama untuk menguruskan D2 dan bahawa ianya adalah adil dan saksama untuk D2 digulung. Hubungan mereka mungkin buruk atau mereka mungkin dalam pertikaian tetapi untuk mengatakan bahawa ianya adalah mustahil untuk memperbaiki hubungan mereka demi D2 adalah para-matang (lihat perenggan 42).]

Cases referred to

Ebrahimi v Westbourne Galleries Ltd [1973] AC 360, HL (refd)

Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316; [2007] 3 CLJ 295, CA (refd)

Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217, CA (refd)

Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor [2018] 4 MLJ 1; [2018] 5 CLJ 513; [2018] 1 LNS 486, FC (refd)

RHB Bank Bhd v Malaysia Pacific Corp Bhd and another appeal [2018] MLJU 103; [2018] 6 CLJ 55; [2018] 1 LNS 127, CA (refd)

Legislation referred to

Companies Act 2016 s 348, 348(2)

Yong Chee Kong (Ravin Woodhull and Chan Chew Weng with him) (Azhar Yong & Co) for the plaintiff.

Wong Fook Meng (Tan Siok Khoon with him) (Chee Siah Le Kee & Partners) for the defendants.

Khadijah Idris J:

INTRODUCTION

[1] The plaintiff's originating summons is for leave to commence derivative proceedings on behalf of the second defendant against the first defendant. After filing the originating summons the plaintiff filed an application in encl 9 for a fortuna injunction to, among others, restrain the first defendant from filing or presenting a winding up petition against the second defendant.

[2] After considering the affidavit evidence and the parties' submissions, this court allowed the plaintiff's application for a fortuna injunction. The first defendant appealed.

[3] It is stated at the outset that this judgment relate to the plaintiff's application for fortuna injunction and that this court is not making any finding of facts in respect of the plaintiff's originating summons for leave which is pending before this court.

SALIENT FACTS

[4] One Lau Jick Ing ('plaintiff') filed an originating summons ('originating summons') for leave to commence a derivative proceeding in the name of Cemerlang Utara ('second defendant) against one Lim Heng Sean ('first defendant') for the benefit of the second defendant and to recover sums of money owing by a company known as Sutera Matra Sdn Bhd ('Sutera Matra') as at 18 November 2019. The plaintiff attached a draft statement of claim in his affidavit supporting the originating summons.

[5] Prior to the commencement of the originating summons, the plaintiff through his solicitor had on 26 September 2019 issue a notice pursuant to s 348 of the Companies Act 2016. Through his solicitors' letter dated 24 October 2019, the first defendant informed he had only received the notice on 16 October 2019. Through his solicitors' letter dated 13 November 2019 the second defendant raised issues against the plaintiff which will be discussed below.

[6] The plaintiff and the first defendant are shareholder and director of the second defendant. The plaintiff holds 100,000 ordinary shares which is fully paid-up. The first defendant holds 100,000 ordinary shares which according to the plaintiff has yet to be paid. Thus both the plaintiff and first defendant holds equal number of shares in the second defendant.

[7] The second defendant, a locally incorporated company, is engage in the business of servicing, maintenance, commissioner for petrol station and related services, construction and renovation.

[8] Sutera Matra a locally incorporated company carries on the business of, amongst others, appointing retail operators for the sale of petroleum products including but not limited to petrol, diesel, lubricants and other lubricant products, under the 'Caltex' brand. Sutera Matra is the Brand Marketer for a company known as Chevron Malaysia Ltd (Co Reg No 992309-U) ('Chevron'). Chevron is supplier of petroleum products in Malaysia in particular Caltex products. Sutera Matra appoints retail operator for sale of petroleum product ie Caltex product.

[9] The first defendant is also a member, director and shareholder of Sutera Matra and said to be the controlling mind of Sutera Matra. This is not disputed by the first defendant.

[10] Through the plaintiff's efforts, the second defendant had procured almost all the service stations for the purposes of appointing retail operators for the sale of petroleum products including but not limited to petrol, diesel, lubricant and other lubricant products.

[11] The second defendant for the past several years had been paid commissions by Sutera Matra for the procurement of the service stations for Sutera Matra. It is the plaintiff's case that it has been the usual conduct, custom and trade between the parties that every month and/or periodically Sutera Matra would send the commission statements to the second defendant and second defendant would then invoice Sutera Matra, in order for the second defendant to receive its payments from Sutera Matra. The second defendant had earned healthy profits in the financial year ended 2016 to 2018.

[12] The list of the service stations procured ('service stations'), had been briefly listed in paras 13.1 and 13.2 in the plaintiff's affidavit in support of this originating summons (see encl 7 exh PI-1 pp 50–51).

[13] It is the plaintiff's case that the aforesaid arrangement shall subsist and be valid and binding on both Sutera Matra and the second defendant for the entire tenure and subsistence of the respective retail trading agreement and or fuel supply agreements made between each of the service stations (procured by the second defendant for Sutera Matra) with Sutera Matra and Chevron (see encl 7 exh PI-1 pp 396–436 for a copy of the retail trading agreement, pp 437–454 and pp 455–472 copies of the fuel supply agreements).

[14] The second defendant had also spent colossal amounts of money to

upgrade some of the service stations, of which up until to date a total of RM1,466,417.88 had been spent by the second defendant.

[15] Sutera Matra had failed to pay the commission fees and as at March 2019 an amount of RM169,374.73 still outstanding and there are further amounts that are continuously outstanding.

[16] The plaintiff claims there has been breach of fiduciary duty on the part of the first defendant and also conflicting interest. Amongst the alleged breach and conflict of interest is as follows:

(a) failure to recover the outstanding sums from Sutera Matra, thereby not acting in good faith and in blatant disregard of the interest of the second defendant;

(b) the first defendant had diverted a contract job to another contractor despite purchase orders via the first defendant was issued by Fea Holdings Sdn Bhd (Co Reg No 12547-D) (a shareholder of Sutera Matra) ('FEA Holdings') to the second defendant. The first defendant is a director and shareholder of FEA Holdings;

(c) the first defendant had caused Sutera Matra to, without account, silently keep all commissions/benefits derived from Syarikat Usahawan Palong Station (hereinafter referred to as the 'Palong Station'), a station which is introduced by Ample Value Sdn Bhd service station (at Yong Peng) (hereinafter referred to as 'Ample Value') but which commissions/benefits were supposed to be earned and due to the second defendant;

(d) the first defendant had used money belonging to the second defendant to purchase a car in Singapore under his wife's name and had been claiming all expenses for the aforesaid car from the second defendant;

(e) the first defendant had controlled the plaintiff payment from Sutera Matra to the second defendant thereby causing the non-payment of expenses which had led the second defendant to face serious consequences including, amongst others, breach of statutory obligations, non-payment of staff salaries, contributions to EPF, SOCSO and income tax; and

(f) the first defendant through Sutera Matra diverted the maintaining and upkeep of the service stations to another company known as FlowFuel Sdn Bhd ('FlowFuel').

Thus it is the plaintiff's case that the first defendant has acted to the detriment of the second defendant's interest as the first defendant failed to act in good faith and in the best interest of the second defendant.

[17] The plaintiff, through his solicitors' letter dated 18 November 2019, served a notice dated 15 November 2019 demanding the first defendant to fully settle a total of RM100,000 for the unpaid shares. Through his solicitors' letter dated 2 December 2019 the defendant, among others denied the demand made by the plaintiff.

Winding up notice to wind up the second defendant

[18] The first defendant through his solicitor then sent to the plaintiff's solicitor a letter dated 2 December 2019 (see encl 7 exh PI-2) a notice of intention to wind up the second defendant ('winding up notice') on the ground that it is just and equitable to do so. It is the first defendant's position that there is a complete and irretrievable breakdown of mutual trust and confidence between the parties that the parties can no longer work together to manage the second defendant.

[19] The grounds advanced by the first defendant to support his intention to wind up the second defendant includes, among others, as follows:

(a) the objective of the second defendant and the agreement between the plaintiff and the first defendant was that all service stations procured shall be exclusively Caltex service stations and shall only distribute and sell petroleum products supplied by Chevron Malaysia Ltd during for the entire tenure of their respective agreements with Sutera Matra and/or Chevron Malaysia Ltd. However the plaintiff had breached the agreement between the parties by taking active steps to persuade some Caltex service stations to breach their existing agreements with Chevron Malaysia Ltd in order to be service stations under the Petronas brand in the following manner:

(i) Chevron Malaysia Ltd had discovered that the plaintiff had entered into discussion and/or negotiations with Caltex retailers for the operation of Petronas service station on their premises. This has led to Chevron Malaysia Ltd to issue a letter dated 27 December 2018 to Erasama Synergy Sdn Bhd ('Erasama') in which the plaintiff is the director and shareholder holding 90% of the shares in the defendant, to cease any and all discussions and/or negotiations with Caltex retailers for the operation of Petronas branded service stations on their premises; and

(ii) the plaintiff who is the shareholder of Mesra Plus Enterprise Sdn Bhd ('Mesra Plus') had directed Mesra Plus to wrongfully terminated the agreement with Sutera Matra and Chevron Malaysia Ltd to operate Caltex service station with an intention to operate a Petronas service station on their premises. Mesra Plus is currently embroiled in an ongoing litigation with Sutera Matra and Chevron Malaysia Ltd. However the director and shareholder holding 50% of the shares in

Mesra Plus Enterprise had given the plaintiff's solicitors a written notice dated 24 September 2019 informing the plaintiff's solicitors that he is not agreeable for Mesra Plus to commence the action against Sutera Matra and Chevron Malaysia Ltd and had requested the plaintiff's solicitors to withdraw the action by Mesra Plus Enterprise against Sutera Matra and Chevron Malaysia Ltd.

(b) the plaintiff had managed the second defendant to the detriment of the second defendant and had prejudiced the first defendant's interests which includes, among others, the following:

(i) the second defendant is operating from an address known as Lot 2489/2490, Jalan Raja Uda, 12300 Butterworth, Penang without the knowledge of the first defendant. The said address is also used as a Petronas service station where its business is in direct conflict with the business interest of the second defendant;

(ii) renting a premise which belongs to a company known as Commerce Plus Sdn Bhd for RM3,200 per month be used as the second defendant's office. The plaintiff is the director and shareholder holding 46.6668% of the shares in Commerce Plus Sdn Bhd. Plaintiff continued to use the address of the said premises as the business address of the second defendant and leaving Lot 19 vacant despite paying monthly rentals to Commerce Plus Sdn Bhd;

(iii) appointing the plaintiff's wife to do clerical and banking related work on a full time basis paid on consultancy basis and not the usual salary with contribution to EPF and SOCSO despite being a full time staff of the second defendant exposing the second defendant to statutory liabilities; and

(iv) the plaintiff has caused the second defendant to terminate the employment of Teoh Song Lim and Lim Cheng Chua without the first defendant's knowledge and consent.

[20] The plaintiff threatened to forfeit the first defendant's duly registered shares in the second defendant without any basis whatsoever. The plaintiff's allegation that the plaintiff had purportedly advanced the sum of RM100,000 on behalf of the first defendant clearly contradicted the defendant's resolution dated 31 March 2016 which was signed by both the plaintiff and the first defendant that shows the shares allotted to the first defendant and the first defendant has been fully paid in cash. The plaintiff's allegation which was raised for the first time and after more than four years of the incorporation of the second defendant and unsupported by any evidence whatsoever of the advancement of payments on behalf of the first defendant is clearly done in bad faith and an afterthought.

ENCLOSURE 9

[21] On 10 January 2020, the plaintiff filed encl 9 seeking the following reliefs:

(a) an order for interim injunction and/or order that the first defendant be restrained, whether by himself and/or by his servants and/or agents and/or otherwise, howsoever from filing and/or presenting any petition and/or any proceedings for any winding up order against the second defendant as threatened by the first defendant, pending the final disposal of this originating summons ('this originating summons'); and

(b) an order for interim injunction and/or order that the first defendant be restrained, whether by himself and/or by his servants and/or agents and/or otherwise, howsoever from advertising any petition and/or any proceedings for winding up against the second defendant in any newspaper and/or in the *Gazette*.

THE PLAINTIFF'S CONTENTIONS

[22] The plaintiff main contentions seeking for the fortuna injunction is that the facts that transpired clearly shows the second defendant's threat to wind up the second defendant is an afterthought and issued in bad faith with a collateral purpose to side-lined the second defendant. Thus the first defendant's petition would have no chance of success and/or bound to fail.

THE DEFENDANT'S OPPOSITION

[23] The plaintiff's contentions that since the plaintiff had filed encl 1 for leave to file a derivate action the first defendant is not entitled to file a winding up petition against the second defendant is completely without merit.

[24] It is argued by the first defendant has strong grounds to justify the proposed winding up petition defendant because the plaintiff and the first defendant clearly can no longer work together to manage the second defendant. Thus the proposed winding up petition has a good chance of success. The grounds are as stated in para 19 above.

[25] The granting of a fortuna injunction is highly prejudicial to the first defendant as it will deprive the first defendant of a defence to the leave application for derivative action. It is argued that the existence of an alternative remedy is a factor for the court to consider in whether to grant the said leave and the first defendant should be given the proper opportunity to canvass the

argument on the existence of an alternative remedy in winding up instead of being deprived of raising such a legal point by way of a draconian remedy such as a fortuna injunction.

[26] The first defendant should not be deprived of the statutory right to present winding up petition on just and equitable grounds the court should not prejudge the issue at this stage of the proceedings. The parties should be given the opportunity to argue before the winding up court. If the grounds of winding up are indeed weak as asserted by the plaintiff, the winding up court will dismiss the winding up petition and there will be no prejudice to the plaintiff or the second defendant.

[27] In the event that the second defendant is wound up, the liquidator of the second defendant will step in and carry out the liquidator's statutory duties including claiming the alleged sum from the first defendant and Sutera Matra in the event that the liquidator deems that the claim is valid and proper. The plaintiff will not suffer any prejudice if fortuna injunction is not granted.

THE LAW

[28] In *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217 the Court of Appeal held an injunction to restrain an intended winding up petition against a company ie fortuna injunction may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. Where the intended winding up petition has a good chance of success, whether or not the intended winding up petition causes irreparable damage is of no consequence (*RHB Bank Bhd v Malaysia Pacific Corp Bhd and another appeal* [2018] MLJU 103; [2018] 6 CLJ 55; [2018] 1 LNS 127).

Whether the proposed winding up petition has a good chance of success

[29] In *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295 the Court of Appeal held the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. A petitioner who relies on the 'just and equitable' clause must come to court with clean hands (*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360).

[30] Having considered the affidavit evidence in totality, this court is of the view the winding up of the second defendant as proposed by the first defendant is an abuse of the court process. As such the proposed winding up petition does not has a good chance of success. The reasons are stated below.

[31] Based on the affidavit evidence the second defendant has, for the past five years, being paid monthly commission fees for each service station procured by the second defendant to Sutera Matra at an agreed rate corresponding with the net amount of petrol and/or diesel purchased each of the service stations. For the purpose of payment of the monthly commission fees, the arrangement between the parties is for Sutera Matra to issue monthly statement ('monthly commission statement') to the second defendant which reflects the quantity of petrol/diesel purchased by the service stations. After receiving the monthly statement, the second defendant will subsequently issue the monthly invoices to Sutera Matra for payment of the commission fees (see in particular para 15 of the first defendant's affidavit encl 14).

[32] However there is an outstanding payment of the commission fees for the month of March 2019 in the sum of RM169,374.73 ('March commission fees'). The details of the March commission fees is as shown at encl 7 exh PI-1 pp 187–197. Besides the overdue March commission fees, Sutera Matra has also not furnished to the second defendant the monthly commission statement for the month of April 2019 and May 2019. As a consequence, the second defendant is prevented from issuing its invoice to Sutera Matra, thus depriving the second defendant from its monthly commission fees.

[33] It is not disputed that the first defendant, besides holding 50% shares in the second defendant, is also a director and shareholder of Sutera Matra. The second defendant is said to be the controlling mind of Sutera Matra and is alleged to have put on hold the payment of the commission fees to the second defendant. It is contended by the plaintiff by such conduct the first defendant is acting in conflicting interest and to the detrimental of the second defendant.

[34] It would appear that such allegations is not without basis. The first defendant in opposing the plaintiff's application for an injunction affirmed an affidavit encl 14. In the said affidavit the first defendant avers that he is a director and a 50% shareholder of shares in the second defendant. However, upon a careful perusal of the said affidavit, the first defendant appears to be putting across Sutera Matra's position and interest rather than that of the second defendant. This can be clearly seen from the following instances:

(a) the first defendant repeatedly states that he and Sutera Matra owes a duty of fidelity to Chevron and the second defendant is bound by such duty and therefore the second defendant is obliged not to act against the interest of Chevron. This position taken by the first defendant is diametrically contrary to his own averment that the second defendant is not a party to the agreement executed between Chevron and Sutera Matra;

(b) the first defendant defended Sutera Matra's refusal to pay the monthly commission fees to the second defendant on the ground that there is no agreement in writing between Sutera Matra and the second defendant that Sutera Matra will pay the second defendant for any definite period. Despite this, the first defendant states payment of the commission fees by Sutera Matra to the second defendant is subject to the second defendant and the plaintiff's duty of fidelity towards Sutera Matra; and

(c) importantly, the first defendant states Sutra Matra is justified in not paying the commission fees to the second defendant on the ground that the plaintiff has breached the fidelity duty towards Sutera Matra and Chevron by persuading individual retailers of Caltex service stations to move to Petronas.

[35] Considering the first defendant's conduct as stated above, there appears to be a conflict of interest on the part of the first defendant which is detrimental to the interest of the second defendant. This is especially so when the second defendant is all along a going concern and making good pre-tax net profits of RM255,393 for the financial period ended at 30 April 2016, RM727,287 for the financial year ended at 30 April 2017 and RM639,821 for the financial year ended at 30 April 2018 (see the annual audited reports reflecting the financial statement of the second defendant at encl 7 exh PI-1 pp 124–185). The first defendant himself admitted that since 2015 to February 2019, the second defendant had been receiving huge profits in the sum of RM6,817,866.28 from Sutera Matra. The plaintiff may have persuaded retailers of Caltex service stations to move to Petronas and the plaintiff ought to be taken to task but it cannot be attributed to the second defendant.

[36] By winding up the second defendant, the second defendant would be deprived of the commission fees from Sutera Matra. Based on the affidavits, the commission fees from March 2019 till the date of the filing of this originating summons has yet to be paid to the second defendant by Sutera Matra. The presentation of the proposed winding up petition will prevent the second defendant from pursuing its claim against Sutera Matra. The first defendant's argument that the second defendant will not be prejudice as the liquidator of the second defendant will pursue the claim against Sutera Matra is untenable.

[37] Firstly, as a going concern company it is unjust and inequitable to wind up the second defendant. Secondly winding up is a drastic action not only to the second defendant as a going concern but also to the creditors of the second defendant. Thirdly the remedy sought in winding up and derivative action are different. The Court of Appeal in *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1; [2018] 5 CLJ 513; [2018] 1 LNS 486 explained the difference between the two actions

as follows:

> [47] ... Derivative action is a procedural convenience for enabling the court to do justice and for the benefit of a company which is controlled by miscreant director and shareholder and persons associated to them. A winding up action, on the other hand, provides a separate remedy to a shareholder to seek redress for his grievance and for his benefit. We wish to emphasise that the court should not shut its door to any person who comes forward to start the proceedings for the benefit of a company and not for some other purpose (*Nurcombe v Nurcombe*).

Thus the winding up of the second defendant will serve the first defendant's interest as a shareholder but will cause irreparable damage to the second defendant which is a going concern. This is especially so in light of the future fees commission it is expected to continue to receive from Sutera Matra for the service stations procured by the plaintiff for the next 20 to 25 years.

[38] Clearly the first defendant's intended winding up proceeding is not bona fide. It is made for a collateral purpose, ie to thwart the second defendant's claim against Sutera Matra where the first defendant has direct proprietary and pecuniary interest.

[39] The first defendant proposed to wind up the second defendant on just and equitable ground. In view of the first defendant's conduct as stated above, the first defendant himself does not come with clean hand for him to seek the equitable jurisdiction of the winding up court to wind up the second defendant on equitable grounds.

[40] It is argued by the first defendant that he has valid grounds to wind up the second defendant and as such he has a good chance of success of winding up the second defendant. The grounds which the first defendant relies on as causing the breakdown relationship between the parties are summarised in para 19 above. This court's view is discussed below:

(a) the plaintiff has breached the fidelity duty towards Sutera Matra and Chevron by persuading individual retailers of Caltex service stations to move to Petronas. As stated above this is a complaint against the plaintiff and ought not to be attributed to the second defendant. The plaintiff may have wronged the first defendant and Sutera Matra, but to use it as a ground to wind up the second defendant is just not equitable;

(b) the plaintiff directed Mesra Plus (where plaintiff is a shareholder) to terminate the agreement with Sutera Matra to operate Caltex service station with an intention to operate a Petronas service station on Mesra Plus premises. Again this is a matter between the plaintiff and first defendant. It does not involve the second defendant;

(c) it is to be noted although the above issues concerning Sutera Matra and Mesra Plus has been going on since December 2018, it appears that winding up the second defendant was never in the mind of the first defendant. The facts shows the intention to wind up the second defendant only became an issue after the plaintiff filed the originating summons, that is the winding up notice was issued almost two weeks after the filing of the same. In fact, the winding up notice was issued almost two months after the s 348(2) notice was served on the first defendant. In his affidavit (encl 6) objecting to the plaintiff's originating summons, the first defendant did not complain the relationship between the parties has irretrievably broken down despite the numerous and various complaints levelled by the first defendant against plaintiff. The first defendant's conduct compelled this court to conclude that the first defendant's intention to wind up the second defendant is not bona fide and an afterthought;

(d) the first defendant also raised issues about the manner the plaintiff manages the second defendant including:

(i) the second defendant is operating from an address which is also used as a Petronas service station where its business is in direct conflict with the business interest of the second defendant. According to the first defendant this is done without his knowledge. However there are contemporaneous documents produced which shows that the second defendant has been using the said address since 2016 and Sutera Matra has since 2016 been using the said address to the second defendant has been sending letters to the second defendant at the said address (see encl 16 exh P-49). Being in control of Sutera Matra and at the same time a director of the second defendant, it is not likely the first defendant is not aware of this. Assuming the first defendant was not aware, the facts does not indicate that the first defendant has raised this issue with the plaintiff to voice his concern back then and prior to the plaintiff raising the issue of overdue payment from Sutera Matra to the second defendant. In any event, there is a resolution passed by the board of directors of the second defendant on 2 May 2019 to change the business address of the company from the said address to another address. It is pertinent to note that the resolution was signed by both the plaintiff and second defendant in their capacity as directors;

(ii) the employment and termination of the second defendant's staff without the first defendant knowledge and consent. The first defendant complained the plaintiff appointed his wife to do clerical and banking related work and paid on consultancy basis and that the plaintiff terminated the employment of two of the second defendant staff without his knowledge. While the defendant may not be happy with such appointment and termination, it is not unusual for a company like the second defendant to carry out such domestic managerial exercise.

[41] It is to be noted the plaintiff, besides complaining about the first defendant directing Sutera Matra not to pay the commission fees to the second defendant, has also raised other issues with regards to the first defendant conduct including the allegations that the first defendant has used the second defendant's money to purchase a car in Singapore for the first defendant's wife.

[42] This court is of the view the above grounds does not appear to be legitimate grounds to have caused the relationship between plaintiff and the first defendant to have been completely irretrievably broken down, as claim by the first defendant. The issues may have caused the relationship between the parties soured and the parties at loggerheads but, on the facts, to say that it is completely impossible to mend the relationship between the parties for the sake of the second defendant is pre-mature.

[43] In fact the first defendant has suggested and the plaintiff agreed for a board of directors meeting to be convened to discuss the complaints the plaintiff and first defendant made against each other. A notice dated 17 June 2019 was issued by the company secretary for the board of directors' meeting ('BoD meeting') of the second defendant to be held on 26 June 2019 (see encl 7 exh PI-1 pp 249–252 and followed by a general meeting immediately thereafter. As can be seen from the agenda of the BoD meeting, the parties has agreed to discuss all the issues raised by them against each other. However the said meeting was aborted because the first defendant did not turn up. The reason given for his failure to attend the BoD meeting is that the plaintiff did not provide him documents (namely the second defendant's bank statements since 2015 and the signed resolution on the bank signatories) he had requested earlier for him to prepare for the BoD meeting.

[44] It is to be noted the documents requested by the first defendant are merely bank statements and resolution which ought not to be a ground for the first defendant not to attend the BoD meeting which proposed to discuss numerous other pressing issues especially the payment of the commission fees by Sutera Matra to the second defendant. This court view the first defendant failed to act in the best interest of the second defendant when he refused to attend the BoD meeting on such flimsiest ground.

[45] Both parties cited the Federal Court case *Perak Integrated Networks Services Sdn Bhd v Urban Domain Sdn Bhd (on behalf of themselves and Pins OSC & Maintenance Services Sdn Bhd through derivative action) & Anor* [2018] 4 MLJ 1; [2018] 5 CLJ 513 to support their position, albeit for different reason. According to plaintiff based on the said case, since the plaintiff has filed an action for leave to commence derivative action, it is therefore not open to the first defendant to file a winding up petition against the second defendant. On the contrary it is argued by the first defendant that a defendant in a

derivative action may present a winding up petition even after the plaintiff had commenced the derivative suit. It is further argued that the derivative action and winding up proceeding can be filed separately and the existence of a derivative action does not preclude a defendant from filing a winding up petition. However, if a defendant fails to file a winding up petition either before or after the filing of the derivative action, then the defendant cannot raise the theoretical availability of the winding up remedy in the derivative action.

[46] The *Perak Integrated Networks Services* case involved a derivative action filed by the plaintiff who held 50% shares in the first defendant company against the second defendant company who held equal shares in the first defendant company and the third defendant who is a director of the first defendant company. The third defendant is also a director of the second defendant company. It was argued on behalf of the second defendant that in a derivative action it is an essential requirement that the complainant must be a minority shareholder. It was further argued that to allow a derivative action in the case of a deadlock would bypass the just and equitable winding up remedy specifically provided for under the law. Thus, in a deadlock situation, the only remedy is to petition for a winding up.

[47] The plaintiff argued that a derivative action and a winding up petition provide for separate remedies open to a shareholder: the former is brought for the benefit of the company, whereas the latter is brought for the shareholder's own benefit. A shareholder in a 50/50 deadlocked company is not precluded from bringing a derivative action for the benefit of the company. As a matter of law the shareholder in such a situation is entitled to bring a derivative action.

[48] The question of law before the Federal Court was whether a derivative action may in law be brought for the benefit of a company, the management and control of which are deadlocked. It was held (see the headnotes):

> ...
>
> (4) Where there is a deadlock in the board and the shareholders of the company which is a going concern, there is no objection in principle to a shareholder filing a petition to wind up the company on just and equitable grounds under s 218(1)(i) of the Act (equivalent to s 465(1)(h) of Companies Act 2016). The availability of winding up the company on just and equitable grounds under s 218(1)(i) of the Act as an alternative remedy does not in itself disentitle a shareholder from opting instead to bring a derivative action on behalf of the company which is a going concern (para 102).
>
> (5) The broad proposition that a derivative action is disallowed if winding up is available as an alternative remedy in respect of a company which is a going concern lacked support in authority and basis in principle. *The option of winding up does not itself operate as an automatic bar to a shareholder bringing a derivative action on behalf of a going concern company. Additionally, winding up a company which is a going*

concern has generally been regarded as a drastic measure. The appropriate route for a shareholder in any case would depend on the nature of the relief sought and whether the necessary elements for the remedy could be satisfied on the facts and circumstances of the case (para 101).

(6) The second defendant had not adduced evidence to indicate that the option of winding up the first defendant under s 218(1)(i) of the Act was considered as an alternative remedy at the time the present suit was filed. At the time the derivative action was instituted, the first defendant appeared to be treated as a going concern; there was no question of the first defendant being in liquidation. It was conspicuous that the second defendant themselves did not file a petition to wind up the first defendant either before or after the plaintiff commenced the present suit. It was not open for the second defendant to now raise the theoretical availability of the winding up remedy as a basis to contend that the action should not have been allowed to proceed in the first place. The grounds of objection raised by the second defendant were dismissed and the derivative action was properly instituted (paras 106 & 107). (Emphasis added.)

[49] Thus, in a company which is of a going concern, the option of winding up does not itself operate as an automatic bar to a shareholder bringing a derivative action on behalf of the company. This is especially so as winding up a company which is a going concern is generally accepted as a drastic measure. However to argue that the derivative action should not be allowed to proceed, it must be shown that at the time the derivative action was filed the option of winding up the going concern company on just and equitable ground was considered as an alternative remedy.

[50] In the instant case the facts clearly indicate the second defendant at all material time is a going concern. Prior to the filing of this action by the plaintiff, despite the numerous complaints of irregularities and mismanagement the plaintiff and first defendant has against each other there is no evidence to show that winding up the second defendant was an issue with the first defendant. This is for obvious reason — the second defendant is a going concern company and it is therefore definitely not to the interest of the first defendant as shareholder and director of the second defendant to wind up the second defendant.

[51] It is however undisputed that after the filing of this action the first defendant had, served on the plaintiff the winding up notice to wind up the second defendant on just and equitable ground. However as stated above, this court is of the view the issuance of the winding up notice by the first defendant is an abuse of the process of the court as it is for a collateral purpose to deprive the second defendant from being paid the commission fee due from Sutera Matra in which the first defendant has a direct interest.

A CONCLUSION

[52] Based on the reasons aforesaid, this court is of the considered view that the winding up petition of the second defendant by the first defendant has no prospect of success. In addition, the winding up of the second defendant will cause irreparable damage to the second defendant as a going concern. The plaintiff's application for a fortuna injunction was accordingly allowed in terms of encl 9 and with costs.

Application for the interim injunction allowed.

Reported by Ashok Kumar